



**Before The  
State Of Wisconsin  
DIVISION OF HEARINGS AND APPEALS**

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In the Matter of the Investigation on the Motion of  
the Department of Natural Resources of an Alleged  
Unlawful Placement of Riprap on the Bed and  
Banks of the Oconto River, in the Town of Green  
Valley, Shawano County, Wisconsin by Mike  
Soper

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Case No.: 3-NE-00-204

**FINDINGS OF FACT, CONCLUSIONS OF LAW AND ORDER**

The Department of Natural Resources staff (Department) conducted field investigations and allege that Mike Soper placed riprap on the bed and banks of the Oconto River in violation of a short-form riprap permit issued to him by the Department. The Department further alleges that the riprap, in its current size and configuration, interferes with the rights and interest of the public on the Oconto River in violation of Wis. Stat. §§ 30.12 and 30.15. On December 1, 2000, the Department filed a request for hearing with the Division of Hearings and Appeals. Pursuant to due notice, a hearing was conducted on April 6, 2001, in Shawano, Wisconsin, Mark J. Kaiser, Administrative Law Judge, presiding.

In accordance with Wis. Stat. § 227.47 and 227.53(1)(c), the PARTIES to this proceeding are certified as follows:

Wisconsin Department of Natural Resources, by

Attorney Michael D. Scott  
P. O. Box 7921  
Madison, WI 53707-7921

Mike and Jean Soper, by

Attorney Peggy L. Miller  
P. O. Box 5637  
DePere, WI 54115

## FINDINGS OF FACT

1. Mike and Jean Soper (Sopers) own real property located at W2442 Riverbend Lane, Cecil, Wisconsin. The legal description of the property is in the SW ¼, SW ¼, Section 6, Township 27 North, Range 18 East, Town of Green Valley, Shawano County. The Sopers' property abuts the Oconto River, which is navigable in fact. The Sopers' property includes 335 feet of shoreline along the Oconto River.

2. The Sopers have owned the above-described property for approximately 25 years. Approximately five years ago, they constructed a home on the property.

3. The Sopers' property is located at a bend in the Oconto River and the riverbank on the Sopers' property is relatively steep. During the construction of their home, the Sopers became aware that a significant erosion problem existed along the riverbank on their property. To protect the riverbank from further erosion, the Sopers applied for and received a permit from the Department to place riprap on the bed of the Oconto River along the bank on their property. Mike Soper began placing fieldstone along the riverbank on his property; however, the permit expired before he completed the project.

4. On April 27, 1998, Mike Soper applied for another "short form" riprap permit in order to complete the project (Ex. 8). The permit was issued the same day. The permit authorizes the Sopers to place rock riprap up to six feet below the ordinary high water mark (OHWM) of the Oconto River and up to seven feet above the water level along the bank.

5. The Sopers hired a contractor, Larry Sperberg, to help them place rock riprap along the riverbank. No rock riprap was placed below the water level of the Oconto River. It is not clear how high above the water level the rock riprap extended after the initial phase of the work was completed. However, some time after the initial work was completed, Mike Soper contacted Larry Sperberg and told him the riverbank was still sliding into the river. In an effort to stabilize the riverbank a large amount of additional rock was placed along the riverbank on the Sopers' property. The surface of the rock riprap now extends between approximately 51 and 88 feet above the OHWM of the Oconto River.

6. The rock riprap placed along the bank of the Oconto River on the Sopers' property far exceeds the riprapping authorized by the "short form" riprap permit issued by the Department on April 27, 1998. All the riprap placed beyond seven feet above the OHWM of the Oconto River has been placed in violation of Wis. Stat. § 30.12.

7. The rock riprap placed along the bank of the Oconto River on the Sopers' property in its current size and configuration adversely impacts the natural scenic beauty of the Oconto River at the site and is, therefore, detrimental to the public interest in the Oconto River.

## DISCUSSION

There are no significant factual disputes in this case. The Sopers admit that they did not review the conditions of the “short form” riprap permit issued to them by the Department and were not aware that they were only allowed to place rock riprap up to seven feet above the OHWM of the Oconto River. They do not dispute that they placed rock riprap far beyond the seven-foot height limit authorized in the permit. The Sopers also agree that the rock riprap they have placed along the bank of the Oconto River along their property has impaired the natural scenic beauty of the area. The issue that is disputed in this case is how to remedy this situation.

The Department is insistent that the Sopers remove all rock riprap placed above the seven-foot point above the water level on the bank of the Oconto River and restore the vegetation on the bank above that point. The Sopers, although they agree that the current bank is “ugly,” believe that the riverbank along their property is now stabilized and they fear if they remove the rock riprap above the seven-foot point, the bank will again be unstable and resume sliding into the river. The Sopers believe that removing the rock riprap now will exacerbate the situation and only result in more soil sliding into the Oconto River. Their preferred remedy is to cover the rock with topsoil and replant native vegetation along the bank.

The only negative impact from the placement of the rock riprap in excess of the extent authorized by the permit is the destruction of a natural scenic beauty of this stretch of the Oconto River. The goal of both parties is to restore native vegetation and natural scenic beauty to this section of the riverbank. There is no apparent reason to require the Sopers to remove the rock riprap above the seven-foot point above the water level of the Oconto River if they can restore native vegetation to the area without removing the rock riprap. If the Sopers are willing to undertake this task, they deserve an opportunity and sufficient time to accomplish this goal.

The following order requires the Sopers to restore native vegetation to the subject area of the Oconto River above the seven-foot point above the water level of the Oconto River. At the Sopers option they can comply with this order by either removing the rock riprap above the seven-foot point or covering the rock riprap above this point with sufficient topsoil to sustain vegetation.<sup>1</sup> It will be up to the Sopers to choose how they wish to comply with this order; however, they must assume the risk if the method they choose fails. As discussed above, the parties do not dispute that the rock riprap placed by the Sopers along the riverbank exceeds the amount authorized by the “short form” riprap permit issued by the Department. The Sopers also have the option of applying for an after-the-fact permit authorizing the placement of rock riprap

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<sup>1</sup> Although the Sopers placed riprap on the bank above the water line far in excess of the distance authorized in the permit they received from the Department, they did not place any riprap below the OHWM even though the permit authorized them to place riprap up to six feet below the OHWM. The Department witness speculated that if the Sopers had placed riprap below the OHWM of the Oconto River as authorized by the permit, the bank on their property might not have continued to slide into the river. If the Sopers choose to remove the riprap beyond the seven-foot point above the water level of the Oconto River, presumably the Department would issue them another “short form” permit authorizing them to complete the project as originally permitted (the “short form” permit issued to the Sopers on April 27, 1998, is expired).

in the size and configuration that it was actually placed on their property. This alternative is a less desirable option than removing or covering the riprap above the seven-foot point above the water level of the Oconto River because the processing of an after-the-fact permit application will further delay the time before any vegetation is planted in this area. However, it is an alternative the Sopers may need to consider if they believe that the rock riprap in its present size and configuration is necessary to stabilize the riverbank on their property and they do not believe they can restore native vegetation to the area.

### CONCLUSION OF LAW

1. Mike and Jean Soper are riparian owners along the Oconto River within the meaning of sec. 30.12, Stats.
2. The rock riprap placed on the bank of the Oconto River on the Soper property can only be maintained if the Department issues a permit authorizing the deposition of this material pursuant to Wis. Stat. § 30.12. The rock riprap placed by the Sopers violates the conditions of permit issued by the Department. The placement and maintenance of the rock riprap above the seven-foot point above the OHWM of the Oconto River constitutes a violation of Wis. Stat. §§ 30.12 and 30.15.
3. The rock riprap placed by the Sopers in excess of the extent authorized by the permit issued by the Department impairs the natural scenic beauty of this stretch of the Oconto River and is “detrimental to the public interest in navigable water” within the meaning of sec. 30.12(2), Stats.
4. The placement and maintenance of the rock riprap in violation of secs. 30.12 and 30.15, Stats., constitutes a public nuisance pursuant to sec. 30.294, Stats. This violation will be abated by the Sopers compliance with following order.
5. Pursuant to secs. 30.02, 30.03(4)(a) and 227.43(1)(b), Stats., the Division of Hearings and Appeals has the authority to issue the following order.

## ORDER

On or before September 1, 2002, Mike and Jean Soper shall restore native vegetation to the riverbank of the Oconto River on their property above a point seven feet above the ordinary high water mark of the Oconto River. The Department shall provide the Sopers with a list of acceptable native plants that they can plant at this site by June 1, 2001 and the Sopers shall select the plants they plant on this site from the Department's list. The Sopers shall allow Department employees access to the project site at any time during the restoration project to make inspections and determine whether the work is in compliance with the permit issued to the Sopers by the Department on April 27, 1998, and this order.

Dated at Madison, Wisconsin on May 7, 2001.

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DIVISION OF HEARINGS AND APPEALS  
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By: \_\_\_\_\_  
Mark J. Kaiser  
Administrative Law Judge

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## NOTICE

Set out below is a list of alternative methods available to persons who may desire to obtain review of the attached decision of the Administrative Law Judge. This notice is provided to insure compliance with sec. 227.48, Stats., and sets out the rights of any party to this proceeding to petition for rehearing and administrative or judicial review of an adverse decision.

1. Any party to this proceeding adversely affected by the decision attached hereto has the right within twenty (20) days after entry of the decision, to petition the secretary of the Department of Natural Resources for review of the decision as provided by Wisconsin Administrative Code NR 2.20. A petition for review under this section is not a prerequisite for judicial review under secs. 227.52 and 227.53, Stats.
2. Any person aggrieved by the attached order may within twenty (20) days after service of such order or decision file with the Department of Natural Resources a written petition for rehearing pursuant to sec. 227.49, Stats. Rehearing may only be granted for those reasons set out in sec. 227.49(3), Stats. A petition under this section is not a prerequisite for judicial review under secs. 227.52 and 227.53, Stats.
3. Any person aggrieved by the attached decision which adversely affects the substantial interests of such person by action or inaction, affirmative or negative in form is entitled to judicial review by filing a petition therefor in accordance with the provisions of sec. 227.52 and 227.53, Stats. Said petition must be filed within thirty (30)

days after service of the agency decision sought to be reviewed. If a rehearing is requested as noted in paragraph (2) above, any party seeking judicial review shall serve and file a petition for review within thirty (30) days after service of the order disposing of the rehearing application or within thirty (30) days after final disposition by operation of law. Since the decision of the Administrative Law Judge in the attached order is by law a decision of the Department of Natural Resources, any petition for judicial review shall name the Department of Natural Resources as the respondent. Persons desiring to file for judicial review are advised to closely examine all provisions of secs. 227.52 and 227.53, Stats., to insure strict compliance with all its requirements.